Supreme Court, U.S.
FILED
DEC 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TONY B. AMADEO,

Petitioner,

VS.

RALPH KEMP, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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No. 87-5277

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

TONY B. AMADEO,

Petitioner,

vs.

RALPH KEMP, WARDEN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was

* Letters from the parties consenting to the filing of this Brief have been lodged with the Clerk of the Court.

formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid without cost to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years its attorneys have represented parties and have participated as amicus curiae in this Court and in the lower federal courts in cases involving racial injustices.

The Fund has a longstanding concern with the issue of the exclusion of Blacks from service on juries. Thus, it has raised jury discrimination claims in appeals from criminal convictions[1] and pioneered in the affirmative use of civil

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[1] E.g., Alexander v. Louisiana, 405 U.S. 625 (1972).

actions to end discriminatory practices.[2]

SUMMARY OF ARGUMENT

The prosecutor's involvement in a clandestine scheme to violate the Constitution and conceal the violation disentitles him from invoking the doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977) to block federal adjudication of the unconstitutional scheme.

ARGUMENT

THE CONSTITUTION AND LAWS OF THE UNITED STATES REQUIRE THAT PETITIONER'S CONVICTION BE VACATED

When officials of the State of Georgia intentionally manipulated the selection of jurors in Putnam County in order to limit the number of Black citizens selected to the smallest number possible, and did so in a manner

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[2] Carter v. Jury Commission, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Mitchell v. Johnson, 250 F. Supp. 117 (M.D. Ala. 1966).

specifically designed to conceal the fact that such a scheme was in force, their actions were a direct affront to all Black citizens of this country. When the district attorney obstructed the presentation to state courts of any challenge to this scheme, by cloaking it over, and when he now seeks to foreclose a challenge to the scheme in federal court by invoking the principle of comity embodied in Wainwright v. Sykes, 433 U.S. 72 (1977), he adds insult to injury. Such venality should estop a prosecutor from invoking an equitable principle that is based on the assumption that state officials are conducting their affairs in an honest and lawful manner.

Section 243 of Title 18 of the United States Code provides, in part:

> [W]hoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or

> fails to summon any citizen [on account of race, color, or previous condition of servitude], shall be fined not more than $5,000.

Petitioner Amadeo was indicted, convicted, and sentenced to death by juries selected pursuant to a conspiracy to violate § 243. This conspiracy was so successful that it was not discovered until after petitioner's trial, and then only through a fortuity. The question before this Court, therefore, is whether the State of Georgia can rely on the success of a criminal conspiracy by prosecuting officials to bar federal court review of a conviction and death sentence that are the fruits of that very conspiracy.

Amicus strongly urges that there is nothing in the decisions of this Court or in any legitimate rules of comity or forfeiture that should allow the state to profit from its unlawful and patently

racist actions. It has been a criminal offense under the laws of the United States to exclude or fail to summon jurors because of their race since 1875. See Ex parte Virginia, 100 U.S. 339 (1880). The actions of the district attorney and the jury commissioners in Putnam County, Georgia in 1977 were, as demonstrated by the uncontroverted facts, deliberate and intentional violations of the Constitution and laws of this land, so clearly deliberate and intentional as to amount to criminal conduct.[3]

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[3] The history of the statutory and decisional law prohibiting jury discrimination (see infra), and the circumstances of the plot revealed by the record and found established by the district court below, make it plain that the Putnam County officials knew exactly what they were doing and were motivated by the many jury discrimination cases brought in Georgia at the time, including one in neighboring Taliaferro County. Turner v. Fouche, 396 U.S. 346 (1970). See also, e.g., Broadway v. Culpepper, 439 F.2d 1253 (5th Cir. 1971); Foster v. Sparks, 506 F.2d 805 (5th Cir. 1975); Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977).

Indeed, the very purpose of the conspiracy was to avert a judicial ruling that the juries in Putnam County were unconstitutional by deliberately excluding just enough Black citizens to prevent a finding of discrimination based on statistics. Nevertheless, as this Court has made clear in such cases as Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69, 79, n. 3 (1986), and Alexander v. Louisiana, 405 U.S. 625, 628-29 (1972), the intentional exclusion of any number of Blacks from a jury because of their race violates both the Constitution and 18 U.S.C. § 243.

The findings of the district court, which are binding unless clearly erroneous, establish that as soon as the petitioner learned of the criminal acts of

the Putnam County officials he attempted to raise his claim of unconstitutional and illegal jury discrimination in the Georgia courts. The district court further found that it would not have been possible to have uncovered the conspiracy before trial because of its deliberately covert nature. Given these clear facts and the undoubted command of the law, it is difficult to conceive of any countervailing equitable principles that should result in Georgia's obtaining an advantage because of the criminal actions of its officials.

Petitioner argues that the conduct of his counsel cannot be faulted, and that the clear presence of both "cause" and "prejudice" place this case within the established exception to the Sykes waiver rule. Petitioner's argument is clearly correct, but Amicus believes it is inappropriate to allow the state to invoke

the Sykes analysis at all. Sykes is grounded in the state's legitimate interest in an orderly and rule-bound judicial process. It is also a reflection of a policy intended to promote respect for state court enforcement of federal constitutional rights. Where a prosecuting authority intentionally schemes to keep his own and other state officials' unconstitutional acts from coming under the scrutiny of orderly judicial processes by forestalling their discovery and adjudication in the state -- or any other -- court system, the prosecutor should no more be permitted to pervert the legitimate shield of Sykes into a sword for waging war against the Constitution than a criminal defendant may identically pervert procedural protections created to preserve his or her Fourth, Fifth and Sixth Amendment interests. See United

States v. Havens, 446 U.S. 620 (1980); Harris v. New York, 401 U.S. 222 (1971). Technical analysis of the "cause" and "prejudice" elements of Sykes is hardly necessary to deny its availability for manipulation by a prosecutor in this fashion.

This case is but the latest in a long series of examples, stretching back to 1880, of the refusal of state officials to recognize the right of Blacks to be free of racial discrimination in the selection of juries and the right of all defendants to be tried by a criminal justice system untainted by racism.[4] To permit the

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4 See, e.g., Strauder v. West Virginia, 100 U.S. 303 (1880); Ex parte Virginia, 100 U.S. 339 (1880); Neal v. Delaware, 103 U.S. 370 (1881); Gibson v. Mississippi, 162 U.S. 565 (1896); Carter v. Texas, 177 U.S. 442 (1900); Norris v. Alabama, 294 U.S. 587 (1935); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Patton v. Mississippi, 332 U.S. 463 (1947); Avery v. Georgia, 345 U.S. 559 (1953); Hernandez v. Texas, 347 U.S. 475 (1954); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Whitus v. Georgia, 385 U.S. 545 (1967); Jones v. Georgia, 389 U.S. 24 (1967); Sims v. Georgia, 389 U.S. 404 (1967); Carter v. Jury Commission, 396 U.S. 320 (1970) (Alabama); Turner v. Fouche, 396 U.S. 346 (1970) (Georgia); Alexander v. Louisiana, 405 U.S. 625 (1972); Peters v. Kiff, 407 U.S. 493 (1972) (Georgia); Rose v. Mitchell, 443 U.S. 545 (1979) (Tennessee); Vasquez v. Hillery, 474 U.S. 254 (1986) (California); Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69 (1986).

indictment, conviction, and death sentence to stand would simply encourage other state officials to embark on similar criminal conspiracies, but to conceal them more effectively in the hope that they also would not be discovered until after a trial has been held. If, on the other hand, this Court reverses the court of appeals and orders petitioner to be retried by a jury constituted in accord with the Constitution and laws of the United States, it will do no more or less

than underline once again the vital message that this most pernicious form of racial discrimination will not be tolerated.

CONCLUSION

The decision of the court below should be reversed.

Dated: December 14, 1987.

Respectfully submitted,

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